

THE POWERS OF THE COMMANDER IN CHIEF IN THE STRUGGLE AGAINST TERRORISM

The panel was convened at 2:45 p.m., Friday, March 31, by its chair, Curtis Bradley of Duke University of Law, who introduced the panelists: David Golove of the New York University School of Law; John Harrison of the University of Virginia School of Law; Thomas Hemingway of the Office of Military Commissions; and Deborah Pearlstein of Human Rights First.*

PARSING THE COMMANDER IN CHIEF POWER: THREE DISTINCTIONS

By Curtis A. Bradley[†]

As Justice Jackson noted in the *Youngstown* steel seizure case, the Commander in Chief Clause has “given rise to some of the most persistent controversies in our constitutional history.”¹ That clause is being invoked by the executive branch in connection with a number of contemporary controversies, including the military detention of suspected terrorists, the use of military commissions to try terrorists, and the National Security Agency’s post-September 11th program of warrantless surveillance.

In considering the powers of the commander in chief in these contexts, it is useful to keep in mind several distinctions: between the President’s statutory and constitutional authority; between the President’s inherent and exclusive constitutional authority; and between international law as an external limitation and international law as an internal limitation on the President.

First is the distinction between the President’s statutory authority and his constitutional authority. When Congress has granted the President the authority to carry out a war-related activity, courts are likely to defer to the combined judgment of the political branches, and will typically avoid reaching the question of whether the President would have had the authority to carry out the action in the absence of congressional authorization. In these situations, presidential action will fall within the highest category of the framework suggested by Justice Jackson in *Youngstown* for evaluating claims of presidential authority and therefore will be “supported by the strongest of presumptions and the widest latitude of judicial interpretation.”²

In *Hamdi v. Rumsfeld*, for example, the Supreme Court concluded that President Bush had the authority under the Authorization for the Use of Military Force (AUMF), which Congress enacted shortly after the September 11 attacks, to detain a U.S. citizen who had been captured during the fighting in Afghanistan, and the Court declined to reach the question of whether the president would have had this authority in the absence of the AUMF.³ Similarly, in *Ex parte Quirin*, the Court concluded that President Roosevelt had the authority under Article 15 of the Articles of War (now Section 821 of the Uniform Code of Military Justice) to try a group of German saboteurs (including one who may have been a U.S. citizen)

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¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

² *Id.* at 645.

³ 542 U.S. 507 (2004).

by military commission, without reaching the question of whether this action fell within the President's constitutional authority.⁴

A second distinction that can be drawn is between the President's inherent constitutional authority and his exclusive constitutional authority. The inherent constitutional authority of the President simply refers to authority that the President has independent of any grant of authority by Congress. Because the Constitution gives war-related powers both to the President and to Congress, the inherent powers of the President in this area are likely to overlap with the powers of Congress. That is, the powers of the two branches on some issues will be concurrent.

By contrast, the President's exclusive constitutional authority refers to authority that is not only inherent but is also immune from congressional regulation. As the Supreme Court has noted, under our system of separation of powers, "one branch of the Government may not intrude upon the central prerogatives of another."⁵ A possible "central prerogative" of the President acting as commander in chief is the direction and control of U.S. troops on the battlefield; if so, an effort by Congress to regulate such direction and control might be unconstitutional.

This distinction between inherent and exclusive presidential power was blurred in some of the executive branch memoranda relating to the war on terrorism that were obtained by the press. In the widely discussed "torture memo," for example, precedent and practice supporting inherent presidential power to take action against the enemy in wartime were used to support the claim that Congress may not regulate the U.S. military's treatment of enemy detainees, an unlikely proposition in light of Congress's express constitutional authority to regulate the armed forces and the long history of treaty and statutory provisions relating to treatment of the enemy. (As others have noted, the *Youngstown* framework was also noticeably absent from the memo.)

The third distinction concerns the relationship between the President's authority and international law. Here we can distinguish between international law as an external limitation and international law as an internal limitation. International law operates an external limitation if it is a type of law that binds the President directly—through, for example, the Take Care Clause of the Constitution, which states that the President is obligated to take care that the "Laws" are faithfully executed. It is possible that the role of international law as an external limit will depend on its form—whether in a self-executing treaty, a non-self-executing treaty, or in customary international law. The Supreme Court has indicated, for example, that customary international law may not be enforceable as U.S. law if it is inconsistent with "controlling executive acts."⁶

Even when international law does not operate as an external limit, it may operate as an internal limit if it is incorporated into a constitutional or statutory provision that applies to the President. Some have suggested, for example, that we should interpret the Commander in Chief Clause of the Constitution in light of international law. To take a less controversial example, the statutory references to military commissions in the Uniform Code of Military Justice are probably grants of authority only to try offenses cognizable under the international laws of war, which means that the government would lack statutory authority, unless otherwise authorized by Congress, to use military commissions to try non-international crimes.

⁴ 317 U.S. 1 (1942).

⁵ *Loving v. United States*, 517 U.S. 748, 757 (1996).

⁶ *See The Paquete Habana*, 175 U.S. 677, 700 (1900).

UNDERSTANDING CURRENT ASSERTIONS OF EXECUTIVE POWER

*By Deborah Pearlstein**

In terms of their implications for existing U.S. and international human rights and humanitarian law, the Bush administration's activities have been most significant in the detention, treatment, and trial of detainees held in connection with the "war on terror"—a conflict the administration has defined as including military activities in Afghanistan and Iraq, as well as military and intelligence activities worldwide against Al Qaeda and those "associated" with Al Qaeda or related terrorist groups of global reach.

DETENTION

The United States currently detains about 15,000 people in operations it considers related to the "war on terror," from Iraq, to Afghanistan, to a Navy brig in Charleston, South Carolina, to the U.S. naval base at Guantanamo Bay. (There are also reports of some dozens held at secret CIA and other detention facilities under unclear legal authority; I will not address these cases here.)

In the continental United States, there remain two individuals who have been designated "enemy combatants" by the President: José Padilla (currently in civilian custody, but who remains, according to the White House, subject to military detention at the President's discretion) and Ali Saleh Kahlah Al Marri. The President relies on both the Authorization for the Use of Military Force (AUMF), passed by Congress in the wake of September 11, and his commander in chief power under the Constitution, as sources of authority for these detentions. In the President's view, his power as commander in chief authorizes him to seize and detain anyone in the world—including in the continental United States—whom the President identifies as "affiliated with al Qaeda." Further, according to administration briefs, Congress may not have power to limit this authority through statutes like the federal Non-Detention Act (passed following the internment of Japanese-Americans during World War II and requiring an act of Congress to authorize the detention of any U.S. citizen). The most recent administration briefs in court cases challenging the President's authority in this realm do not mention the Geneva Conventions as a relevant limit on executive authority (or indeed invoke Geneva at all).

With respect to those still held at Guantanamo Bay, the President again relies on his authority as commander in chief to detain captives picked up in the course of armed conflict. Again here, the President points not to the traditional battlefield engagement between the United States and Afghanistan as the relevant armed conflict for the purpose of the application of the laws of war (and indeed, many of those now at Guantanamo were not captured in Afghanistan), but rather a "global" conflict against Al Qaeda, its affiliates, and other terrorist groups of global reach.

Finally, since the official handover of sovereignty from the United States to Afghanistan, and from the United States to the new government in Iraq, the United States no longer appears to rely directly on the Geneva Conventions (or on the President's authority as commander in chief) as the source of power to engage in ongoing detention operations in those countries. Rather, according to letters to the UN Security Council from the U.S. Secretary of State, the United States now holds detainees in Afghanistan under UN Security

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Council Resolution 1566, which generally states to take necessary steps to prevent the commission of terrorist acts. In Iraq, the United States says it now holds only “security detainees” under the authority of UN Security Council Resolutions 1546 and 1637. As a letter by Secretary of State Colin Powell appended to SCR 1546 explains, the United States “remains committed at all times to act consistent with obligations under the law of armed conflict, including the Geneva Conventions.”¹ The wording of this letter (particularly when seen in light of now public early internal guidance to the President from the Justice Department and other legal advisors) strongly suggests the administration views this “commitment” as a matter of discretion, not as an obligation under law.

DETAINEE TREATMENT

With a still growing record of serious abuse by U.S. officials against those held in U.S. custody, it remains critically important how the President understands what limits there are on his power to engage in the detention and interrogation of individuals. According to the latest statistics from the Defense Department, there have been approximately 600 criminal investigations into detainee abuse in the “war on terror”; and 250 soldiers disciplined through courts-martial, non-judicial, or administrative punishments. As Human Rights First recently reported, nearly 100 detainees have died in U.S. custody in Iraq and Afghanistan, including 45 homicides, and at least 8 people who were tortured to death.

While we continue to await the long-promised revised Army Field Manual on interrogation operations, the clearest expressions of the administration’s understanding of its power in this area suggest an ongoing view that neither statutory nor treaty provisions banning torture or cruel, inhuman or degrading treatment fully constrain the President in his power as commander in chief. For example, in a February 2002 memo (evidently still in effect), the President acknowledges a policy interest in treating detainees humanely, but denies any legal obligation to do so. Rather, the memo finds that Common Article 3 of the Geneva Conventions (establishing baseline protections against inhumane treatment) does not apply “to either Al Qaeda or Taliban detainees,” because, among other reasons, the relevant conflict (against terrorism) is international in scope and Common Article 3 applies only to “armed conflicts not of an international character.”²

The current public guidance from the Justice Department—issued in December 2004 to replace the Department’s 2002 “torture memo,” which largely rejected congressional anti-torture limits on presidential authority—does not address the President’s authority in this realm, concluding that such an analysis is “unnecessary.” Yet in signing a new statutory ban on cruel, inhuman, and degrading treatment into law late last year, the President sought to preserve the discretion carved out in the 2002 memo. The President’s signing statement cautioned:

The executive branch shall construe the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on

¹ S.C. Res. 1546, at 10, U.N. Doc. S/RES/1546 (June 5, 2004).

² Memorandum from President Bush to National Security Staff, Re: The Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* <http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf> (accessed Oct. 18, 2006).

the judicial power, which will assist in achieving the shared objective of the Congress and the President, of protecting the American people from further terrorist attacks.³

In this respect, the administration continues to advance the view that statutory restrictions on interrogation techniques could unconstitutionally limit the President's power as commander in chief. (As for constitutional limits on the President's power to interrogate prisoners—including Fifth Amendment due process protections—the White House has maintained in litigation that the Constitution does not constrain U.S. operations conducted outside the continental United States.)

TRIAL

While the President announced the establishment of military commissions to try suspected war criminals at Guantanamo Bay in November 2001, only 10 of the current 500 detainees held at the base have to date been subject to charges before the commission. Substantive and procedural rules for the commissions—a mélange of U.S. and international law bundled into a new body of doctrine called “commission law”—have since been promulgated, and have changed, at times significantly, fifteen times since 2001. The President, by commission rule, retains the power to amend any of these rules at any time. And while the commission process has moved closer to meeting universal fair trial standards since its establishment, there are still rights generally recognized as fundamental that are not afforded to defendants. For example, a defendant has only limited rights to confront evidence against him, or to select counsel of his choice.

The President has cited both statutory authority and the Commander in Chief Clause as the source of his power to establish military commissions. And while most advocates and scholars recognize presidential authority to establish commissions in the first instance, the administration has argued—over substantial objection—that the commissions need neither incorporate the rights protections set forth in the current statutory code of military justice (since the commissions are meant to be more speedy and battlefield-efficient than the court-martial system), nor the protections embodied in the U.S. Constitution (since, according to the White House, non-citizens held abroad have no constitutional rights—including, for example, the right to a speedy trial). The administration likewise maintains that while the commissions are intended to be war crimes tribunals (and must charge offenses recognized under the laws of war), neither Common Article 3, nor any of the other protections recognized by the Geneva Conventions for trial proceedings, apply to those held at Guantanamo Bay. As the Solicitor General recently explained to the Supreme Court in oral arguments: “The fact that the Geneva Conventions are part of the law of war doesn’t mean that the Petitioner is entitled to any protection under those conventions.”⁴

ASSESSING PRESIDENTIAL POWER

So what’s wrong with this picture? In my judgment, the position the President has taken in defining his own authority in these areas cannot be squared with the text or history of the U.S. Constitution; the letter and spirit of existing international humanitarian law; or fundamental concepts of the rule of law.

³ President’s Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1919 (Dec. 30, 2005).

⁴ Transcript of Oral Argument, *Hamdan v. Rumsfeld*, No. 05-184 (U.S. Mar. 28, 2006), at 42, available at <http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf> (accessed Oct. 18, 2006).

First, the administration's view of the commander in chief power is inconsistent with the U.S. Constitution. This is particularly the case with the most radical argument the administration has made with regard to that power—that it would be unconstitutional for Congress to pass laws, criminal or otherwise, limiting the President's discretion to manage the detention and treatment of individuals. This view of executive supremacy over Congress cannot be squared with the Supreme Court's clear statement to the contrary in the *Steel Seizure* case during the Korean War—recognizing congressional supremacy even in matters of national security, particularly as they affect individual rights. It also cannot be squared with the multiple other clauses in the Constitution—which are in no sense subordinate to the single Commander in Chief Clause—that conflict with such a reading: the powers the Constitution grants to Congress; the affirmative obligation it imposes on the President to “take care” that *all* U.S. laws are faithfully executed; and of course the affirmative rights and liberties granted by the Constitution to those under U.S. jurisdiction and control. And it cannot be squared with the idea that ours is a government of limited powers, that no one branch can operate with total discretion, and that every power the government may employ is susceptible of regulation—and is regulated—by law.

Second, the administration's use of the Geneva Conventions (and the laws of war generally) has been, at best, a selective one-way ratchet. The President has sought to embrace the benefits of the laws of war, while rejecting any of its rights-protecting burdens on executive power. As the Solicitor General argued to the Supreme Court in the *Hamdan* case this week challenging the military commissions, the laws of war are a source of the President's power to detain and try suspected war criminals, but the protections these laws include do not apply to a broad swath of detainees the President would try for criminal violations of these laws. Apart from the obvious logical inconsistency of such a position, such an argument, in my view, is manifestly inconsistent with the letter and purpose of the laws of war, which were revised after World War II expressly for the purpose of establishing and protecting *individual rights* even in the chaos of war. Beyond this, it seems at best ironic for this administration to assert that a source of U.S. detention power flows from international law (in the case of the current large detention operations in Iraq, a UN resolution). At worst, it is (again) inconsistent with the idea of executive power under the Constitution—an idea premised on the notion that the President (and the other coequal branches) has *only* that power granted by the Constitution, and that the U.S. government does not have all the power in the world, but has only limited power in the interest of protecting individual freedom.

Third, and perhaps most important, the ad hoc structure of detentions and the military commission trials, as well as repeated statements in defense of the President's power in these realms, appear to challenge the very idea of the rule of law. At its most basic, this idea is that people will be governed by public laws that are known in advance, applied equally in all cases, and binding on both individuals and the conduct of the government. Or, as Justice Kennedy described it in his remarks earlier in this conference, the rule of law must be “regular, consistent, logical, predictable, knowable, fair, with known boundaries and known definitions.”⁵

Against this definition, consider the administration's domestic use of the “enemy combatant” designation. What's the difference between Padilla the “enemy combatant” (held without access to counsel for three years) and Moussaoui, who is getting the full benefits

⁵ Honorable Anthony Kennedy, Associate Justice, United States Supreme Court, Plenary Address at the ASIL 2006 Centennial Conference, “A Just World Under Law” (Mar. 30, 2006).

of our criminal justice system? The Justice Department has said that determining the difference between them was up to the President; there's no "bright line" dividing "combatant" from everyday criminal defendant. In oral arguments in the *Hamdi* case in 2004, the Justice Department was asked to explain what *rights* "enemy combatants" have: "As I understand it," the Justice Department lawyer said, "the plan on a going-forward basis reflecting the unique situation of this battle is to provide individuals . . . like Padilla, with the equivalent" of some review. "We don't know for sure."⁶ A going-forward plan, with protections, whatever they may be, as yet unknown, is not a system of "rights" under law at all. (One might say the same for the military commissions, where the rules have been changed fifteen times since the commission's creation, and the President retains the discretion to change the rules again at any time—even rules going to the core of defendants' rights and the determination of guilt or innocence.)

In describing the United States' current adherence (or not) to the Geneva Conventions in the "war on terror," Administration officials have often indicated that they will abide by Geneva as a matter of policy.⁷ Such statements imply that law is not in fact a fixed or binding limit, but more like any other discretionary resource constraint on policy. Worse, as the administration's March 2005 U.S. National Defense Strategy noted: "Our strength as a nation-state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial processes and terrorism."⁸ Asked whether this was meant to equate legal challenges to U.S. detention and interrogation policies with terrorism, then Undersecretary of Defense Doug Feith replied that among forms of asymmetric warfare now facing the United States were "various actors around the world that are looking to find creative ways to ['constrain' the U.S.] that are not the obvious conventional military attacks," including "diplomatic," and "legal lines of attack."⁹ Comments like this suggest a view that war and law are antagonistic—and that there are broad areas of U.S. operations (secret detention, interrogation) beyond law. It was this idea that the law of war—and the Constitution itself—was designed to overcome. To date, those laws have proven inadequate in many respects to effectively constrain the American executive.

SCOPE OF PRESIDENTIAL POWER: MILITARY COMMISSIONS—AMERICA'S DOMESTIC WAR CRIMES COURT

*By Thomas Hemingway**

On September 11, 2001, the hijacking of four commercial airliners resulted in the death of over 3,000 innocent civilians. Congress reacted swiftly and, on September 18, issued the

⁶ Transcript of Oral Argument, *Hamdi v. Rumsfeld*, No. 03-6696 (U.S. Apr. 28, 2004), at 43, available at <http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-6696.pdf> (accessed Oct. 19, 2006).

⁷ See, e.g., Dana Milbank and Dana Priest, *Bush: U.S. Expected to Follow Law On Prisoners*, WASH. POST, June 11, 2004, at A06, available at <<http://www.washingtonpost.com/wp-dyn/articles/A32707-2004Jun10.html>> (accessed Oct. 19, 2006); Ron Hutcheson and James Kuhnhehn, *Signing Statements: The Power of the Pen*, KNIGHT RIDDER, THE CHARLOTTE OBSERVER, January 7, 2006, at 13A.

⁸ DEPARTMENT OF DEFENSE, THE DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA, at 5 (Mar. 2005), available at <<http://www.defenselink.mil/news/Mar2005/d20050318nds1.pdf>> (accessed Oct. 18, 2006).

⁹ News Transcript, Department of Defense, Under Secretary of Defense for Policy Douglas Feith and Vice Director, Strategy, Plans and Police Office RAdm William Sullivan (Mar. 18, 2005), available at <<http://www.defenselink.mil/transcripts/2005/tr20050318-2282.html>> (accessed Oct. 18, 2006).

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“Joint Resolution to Authorize the Use of United States Armed Force Against Those Responsible for the Recent Attacks Launched Against the United States”—the AUMF. The AUMF states, in part, that “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”

On November 13, 2001, President Bush issued a Military Order authorizing the Department of Defense to establish military commissions to bring to justice those non-citizen members or supporters of Al Qaeda that threaten the security of America and the world.

Although the President’s Military Order does not spell out the specific, individual procedures guaranteed to accused, the Order guarantees accused the right to a “full and fair” trial and provides for further orders and instructions to implement the Order. Since that time, several military commission orders and instructions have been promulgated, affording accused the presumption of innocence, requirement of proof beyond a reasonable doubt, and a full defense. Most recently, the Department of Defense promulgated Military Commission Instruction Number 10, an order that explicitly excludes from evidence statements obtained by torture. Although the requirement of a full and fair trial arguably includes and mandates this exclusion, this Order was promulgated to address any ambiguity regarding admissibility of such statements.

Military commissions have been challenged as being convened without authority, creating offenses that are not cognizable under the laws of war, and implementing rules of procedure that deprive an accused of fundamental rights. I’ll address each of these challenges in turn.

The President’s authority to implement 9/11 military commissions is based on his inherent authority under the Constitution as the commander in chief of this nation’s armed forces, and Congress’ recognition of that authority in the AUMF, Articles 21 and 36 of the Uniform Code of Military Justice, and the Detainee Treatment Act of 2005.

The Constitution provides several bases for establishing military commissions. The Constitution authorizes Congress to convene military commissions. Under Article 1, Congress has the power to declare war, to “define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations,” to “make rules for the Government and Regulations of the land and naval forces,” and to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers.”

The Constitution also authorizes the President to convene military commissions. Under Article 2, the President, as the commander in chief, is authorized to convene military courts and tribunals pursuant to his wartime powers. This authorization is consistent with historical practice. Since the formation of our republic, the President and other military commanders have convened military commissions; they were convened during the War of 1812, the Mexican-American War, the Civil War, the Philippine Insurrection, the Spanish-American War, and War World II. More importantly, many of these commissions were convened without congressional authorization specifically directing or ordering military commissions.

In 1942 the Supreme Court case addressed the President’s authority to convene military commissions in *Ex parte Quirin*. Eight German saboteurs covertly entered the United States to blow up factories and bridges, and were captured. The President convened military commissions to try the saboteurs on charges of violations of the law of war, conspiracy, and violation of the Articles of War by aiding the enemy, and spying. The accused challenged the legality of the military commissions and attacked the subject-matter jurisdiction of the

commissions. The Supreme Court recognized that Congress authorized the President to convene military tribunals in accordance with the law of war pursuant to Article 15 of the Articles of War then in effect. The Court, however, made clear that it was not determining whether the President could constitutionally convene military commissions without Congressional support. That issue was not before the Court then, and it is not before the Court now in the case of *Hamdan*.

Article 15, relied upon by the Supreme Court in the case of *Quirin*, is incorporated in nearly identical language by Article 21 of the current UCMJ. More importantly, when Congress enacted the UCMJ in the 1950s and recodified the language of Article 15, Congress acted with full awareness of and acquiescence in the holding in *Quirin*—that Article 15 established and evidenced Congress's support for the President convening military commissions.

In addition to Article 21 of the UCMJ, in the present context of 9/11 military commissions, Congress passed the AUMF, authorizing the President "to use all necessary and appropriate force" against Al Qaeda and its supporters. In the recent case of *Hamdi v. Rumsfeld*, the Supreme Court recognized that the AUMF authorized the President to execute his traditional war powers in connection with the conflict against Al Qaeda. As noted by the Court, these wartime powers include the authority necessary for "the capture, detention, and trial of unlawful combatants."

Lastly, Congress recently passed the Detainee Treatment Act ratifying the President's execution of authority to convene military commissions. The Detainee Treatment Act, *inter alia*, requires that the U.S. Court of Appeals for the D.C. Circuit grant mandatory review of all findings of guilty by military commissions resulting in a sentence of ten years or more. The Court can grant discretionary review of all other military commission cases. This is a clear ratification by Congress of presidential authority to convene military commissions.

The real issue before us is not the authority of the President to convene military commissions—but the limits, if any, of the exercise of that power. The exercise of that power takes the form of defining offenses within the jurisdiction of the military commissions and establishing procedures to be afforded an accused before military commissions.

The offenses with which the accused are charged before military commissions are cognizable offenses under the law of war and do not violate the *ex post facto* rule. The definition of "war crimes" is not limited to those offenses codified internationally on the basis of the Geneva Conventions. The United States is not restricted in its domestic determination of those crimes that constitute war crimes. Military commissions are America's common-law war court. Historically, offenses arising from war were cognizable as offenses chargeable by military commissions. Indeed, it is disingenuous for anyone to suggest that America is not authorized to charge conspiracy because it is not recognized by other nations; specifically, civil-law nations. It is equally disingenuous to argue that someone who murders another in the context of armed conflict without possessing a combatant's privilege to do so is not a crime that a state may charge as a war crime. Murder is a crime. Adding the element that it must have a nexus with armed conflict cannot render the crime of murder as a war crime *ex post facto*.

The issue of the limits of the President's authority to fashion military commissions is not limited to the nature of the offenses charged, but also to those procedures afforded an accused. Some concerns have been voiced about the scope and application of military commissions

procedures. These concerns must be differentiated from the legal basis for the President prescribing rules for military commissions.

Although the UCMJ prescribes rules for courts-martials, it does not purport to extend all of its rules to military commissions. The legislative history of the UCMJ establishes that the courts-martial rules set forth in the UCMJ were not intended to apply to military commissions or tribunals except where specifically noted. The drafters took care to distinguish between “military commissions” or “military tribunals” on the one hand, and “court-martials” on the other. Military tribunals and commissions are referenced in only a handful of provisions that regulate military proceedings. The Supreme Court recognized the common-law basis of military commissions in *Madsen v. Kinsella* wherein the Court noted that military commissions are “our common law courts”; “[n]either their procedure nor their jurisdiction has been prescribed by statute.”

In addition, pursuant to Article 36 of the UCMJ, Congress specifically authorized the President to prescribe rules for military commissions. These rules shall “so far as he (the President) considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary or inconsistent with this chapter.” The President, on the basis of the authority vested in him by Article 36, determined that the rules applicable to trials of criminal cases in U.S. district courts; that is, the federal rules of evidence are not practicable because of the unique nature of these proceedings. Further, no military commission rule is contrary to or inconsistent with the handful of provisions in the chapter that apply specifically to military commissions.

The President acted pursuant to and within his authority in convening military commissions, defining offenses, and prescribing rules. The remedy for genuine disagreement regarding the outcome of congressionally and constitutionally authorized and use of presidential power is not judicial tinkering. The remedy, if any is necessary, rests with the legislature.

REMARKS BY DAVID GOLOVE*

In considering the scope of the President’s power as commander in chief, it is useful to begin by contrasting the Bush administration’s conception of the relationship between law and war with the conception found in the American constitutional tradition.

The administration seems openly to embrace the maxim *inter armis silent leges*, and it seeks to implement it as the constitutional law of the United States. It claims, for example, that international law, at least in the context of the “war on terror,” is almost wholly permissive. The Geneva Conventions do not apply, and even the customary laws of war are, in its view, silent. In any case, according to the administration, the Geneva Conventions are not self-executing and, as a result, are not only not enforceable by U.S. courts, but are simply not part of U.S. law at all. Even if they were, the President would have authority, as a matter of domestic law, simply to disregard them, just as he may freely put aside any principles of customary international law that he finds inconvenient.

But it is not only international law that cannot constrain the President. In the administration’s view, Congress is likewise without any such power. A statute which purports to limit the

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discretion of the President in conducting war is simply unconstitutional, because the President's powers in this area are exclusive.

Completing the circle, in the administration's view, the Constitution itself imposes no limits on the President, at least when he is acting against enemies outside of the United States, and it imposes only minimal requirements, in any case, when it comes to U.S. citizens.

According to the administration, then, war is an institution in which the reigning principle is executive discretion. Whatever the President chooses to do is lawful simply by virtue of the fact that he has chosen to do it.

What is most remarkable about this claim is how radically it diverges from the traditional American understanding of war. The Founders valorized the law of nations as a body of law that both empowered and bound the United States from the moment it achieved independence. For the founding generation, the *jus in bello*, in particular, was an enlightened body of law, which traced its origins to antiquity and its modern development to the great writers on the law of nations. The Framers recognized that the conduct of war was appropriately assigned to the executive branch, but that function, like other functions assigned to the executive, was to be carried out in accordance with the law. The notion that the rules of civilized warfare, as they described the laws of war at that time, could be disregarded on executive authority alone, would have struck them as highly objectionable.

This background helps clarify how the Constitution divides authority over war. The President, as an executive official, is given exclusive responsibility for commanding the armed forces, but, at the same time, he always acts subject to a definite legal regime. The source of that law differs depending on the context. In those areas to which laws of war apply—mostly, in regard to engagements with enemies and neutrals—the President is bound to uphold the laws of war. In those areas to which the laws of war do not apply—matters such as the internal regulation of the military forces—the Constitution explicitly grants Congress power to make the necessary rules. Finally, the Constitution contemplates that Congress will have authority to decide whether the United States should exercise the full rights recognized by the laws of war or whether, instead, it should refrain from exercising those rights in some respects. It therefore gives Congress the right to impose restrictions which limit the President from exercising the full belligerent rights of the United States, by restricting—to use an historical example—the capture of neutral or enemy vessels which would otherwise be subject to confiscation as legitimate prizes of war.

The President thus has the power, once the United States is engaged in war, to exercise the rights of the United States under the laws of war. As a general rule, his authority in this respect does not depend upon congressional authorization. Nevertheless, the President is constitutionally bound to observe the laws of war, and he is also bound to uphold any congressional statutes which limit his authority further. Moreover, there are exceptional cases in which the President may not exercise the rights recognized by the laws of war without first obtaining a congressional authorization and even more exceptional cases when the Bill of Rights may limit both his and Congress' powers. Indeed, many of the great constitutional controversies in U.S. history—the celebrated Milligan case being a prime example—have focused on the scope of these exceptions.

Now, the scheme which I have been describing has in fact been widely accepted for the greater part of U.S. history. Indeed, the understanding that President is bound to observe the laws of war was universally accepted in the United States in the late eighteenth, the nineteenth, and at least through the first half of the twentieth centuries. It was affirmed early on by both Madison and Hamilton and other Founders, and it quickly and repeatedly found its way into

Supreme Court jurisprudence. It was also frequently reaffirmed by Presidents and high executive branch officials; by members of Congress and in legislative reports; and by leading commentators on constitutional, international, and military law; and in public debates. Indeed, every war in which the United States engaged, beginning in the late eighteenth century and continuing through the nineteenth, provoked discussion of the issue, and in each instance, the consensus was the same.

It is particularly noteworthy that it was the Civil War that generated the most extensive discussion of these issues. Lincoln, Seward, Speed, military officials, countless members of Congress on both sides of the aisle, public commentators, authors of leading texts—all emphatically agreed. Disagreements focused instead on whether Lincoln's most consequential acts—like the Emancipation Proclamation—were in fact authorized by the laws of war. It is striking that the Civil War was, of course, a civil war, not a war between independent sovereigns. Yet no one ever questioned that the proper measure of the President's commander in chief authority, even when there was no foreign party to the conflict, was to be found in the laws of war. This is because they constituted the minimal rules of civilized warfare and hence provided bottom-line limits on the scope of acceptable conduct.

There has been more controversy historically over Congress' power to narrow the scope of the executive's authority over the conduct of war from the baseline provided by the laws of war. For the most part, Congress was content to leave the President to the laws of war. It simply had no reason to restrict the President further—which would have put the United States at a disadvantage in comparison to other states—or to expand his powers in ways that were uncivilized. Indeed, the most dangerous aspect of the claim that the President can disregard the laws of war is precisely this—that Congress has generally not placed limits on the President's conduct of war on the fully justified assumption that the President would be governed by the laws of war. Nevertheless, Congress did from time to time adopt restrictions that were generally accepted with little or no controversy, although they sometimes provoked more heated debate.

During the Cold War, Presidents began to challenge this settled constitutional understanding, making new claims to exclusive powers and asserting the right to disregard the law of nations, claims which the current administration has pushed to the limit. Unfortunately, I do not have space to explore these developments here. Suffice it to say that these positions have never been affirmed by the Supreme Court or been widely accepted in Congress or in the legal academy. The recent decisions by the Supreme Court in *Hamdi* and *Rasul*, moreover, strongly suggest that the Court continues to adhere to the traditional approach.

Because I do not believe that history provides conclusive answers to constitutional questions, I should briefly explain why I think that the traditional approach continues to make sense from a normative perspective. What is at issue are questions of institutional competence and checks and balances. To be sure, there is agreement that the command of the military should be in the President's hands, but command of the military and the power to determine the rules governing the conduct of war are different matters. While the concentration of these powers in one branch gives rise to classical concerns about abuse of power, there are also grounds to worry that giving the President free reign will lead to inefficacious decision-making. Especially in the context of war, the executive has powerful incentives to favor short-term gains even at the risk of long-term costs. The executive is under intense pressure to achieve quick, tangible victories. He will be tempted to act expediently, even when doing so risks medium- or long-term harms. The laws of war, and the possibility that Congress

might intervene, are disciplining devices, discouraging the executive from making wrong-headed decisions. If the executive can disregard the laws of war at will, and if Congress has no power to act, the President will be tempted to make consequential decisions in secret, avoiding the need to justify his actions publicly. The predictable result will be short-term thinking and bad decisions. It is for these reasons that the executive is more—not less—powerful when his discretion is bounded by rules which prevent him from making mistakes to which he would otherwise be prone.

There are also grounds for thinking that the international laws of war are a normatively attractive body of rules. States tend to negotiate the laws of war in the aftermath of major conflicts, when the larger systemic consequences of short-term, narrowly self-interested tactics, have become clear. For this reason, they are in a favorable position to deliberate about what the mutually advantageous, and morally compelled, legal rules should be. In contrast, a particular state's executive branch officials will consider these questions, not in a period of calm reflection after a war, but under the pressure of grave uncertainties in an ongoing conflict. These are not the kind of circumstances which we should expect to yield decisions that forego short-term advantages to avoid potential long-term costs.

I think that our experience in the past few years bears out these claims. Shortly after 9/11, and notwithstanding the laws of war and explicit congressional statutes, the President decided—in secret and on the basis of classified legal memoranda—to alter radically the traditional American policy on interrogations. He made the decision in view of a perceived imperative to prevent a second attack at all costs. It is possible that the use of these techniques produced intelligence information which helped thwart planned attacks. Even if that were the case, however, the change in policy has also imposed enormous and predictable long-term costs on the United States. Individuals responsible for heinous crimes can never be prosecuted in a civil court; special facilities—so-called “black sites”—were created outside the jurisdiction of courts; individuals were disappeared and held incommunicado indefinitely; ongoing criminal prosecutions against terrorist suspects were compromised; special military tribunals were established to deal with detainees who were not disappeared, and these tribunals needed to accept evidence uniformly viewed as inadmissible by civil courts in liberal democracies; the United States was subjected to persistent international criticism; its ability to promote human rights globally was undermined; other states have found it difficult to cooperate fully with it in dealing with terrorist suspects; its ability to promote liberal democratic values in the Middle East has been compromised; and acrimonious divisions within the country have arisen in view of the profound moral concerns which such a policy raises for many.

My point isn't that the policy was wrong—although I certainly believe that it was—but that it was unconstitutional. Had the President recognized the obligation to go to Congress, he would have been forced to offer a public justification for his policy and to answer critics who would have raised these and other objections. Instead, it seems likely that the President was moved by urgent short-term concerns and ignored or downplayed the long-term consequences of his decision. Indeed, many of those long-term consequences have not yet been fully realized and will not be on this President's watch. The next President, for example, will have to decide what to do with Al Qaeda suspects who have been tortured and held incommunicado for many years in secret facilities, but who are no longer of any intelligence value. Hold them in this fashion for life? Summarily execute them? Give them secret military trials and then execute them? Hand them over to another country to do the same? The choices are not appealing.

